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# Trusts--Necessity of a Trust Res.

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son's reputation in the eyes of a majority of people, but it is sufficient if he would be prejudiced in the opinion of a substantial minority.<sup>11</sup> There can be little question but that *P*'s reputation would be prejudiced among a substantial minority of people who disapprove of beer.

In further limiting the protection of public characters against the use of their likenesses for commercial purposes, and in its conclusion that no injury was suffered by *P*, the decision is certainly open to question.

E. I. E.

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TRUSTS — NECESSITY OF A TRUST *Res.* — Plaintiff contracted with defendant to insure defendant's employees. Premiums were to be collected pursuant to an arrangement whereby defendant by bookkeeping entries was to deduct the premiums from each employee's wage, to credit the amount collected to the plaintiff's account, and subsequently to pay over this amount to plaintiff. Defendant became insolvent before it had paid over all sums which had been credited to the plaintiff's account. Plaintiff claims priority on the theory of a constructive trust. Judgment for defendant. *Held*, that plaintiff was not entitled to priority because a trust *res* is necessary for the creation of a trust. *Inter-Ocean Casualty Co. v. Leconny Smokeless Fuel Co.*<sup>1</sup>

Prior to the instant case there was some doubt in West Virginia as to the requirement of a *res* in the creation of a trust.<sup>2</sup> In *Sullivan v. Madeleine Coal Co.*,<sup>3</sup> defendant maintained a burial fund for its employees, and deducted a certain amount each month from their wages to be paid into this fund. For a time these amounts were deducted from the employees' wages and credited to the fund, but not paid into the burial fund. In insolvency proceedings the court, in allowing priority as to the amount credited to the fund, limited its discussion to whether the trust fund could be *traced*. The court, in attempting to distinguish the *Sullivan* case from the principal case, declares that in the former it was not concerned with the problem of whether a *res* existed, but decided merely that the trust fund could be *traced*. The validity of this dis-

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<sup>11</sup> 3 RESTATEMENT, TORTS (1939) § 559, comment *e*.

<sup>1</sup> 17 S. E. (2d) 51 (W. Va. 1941).

<sup>2</sup> See Note (1931) 31 COL. L. REV. 800, 812, where it is said that "West Virginia does not strictly adhere to the doctrine that there must be a trust *res*."

<sup>3</sup> 115 W. Va. 115, 175 S. E. 521 (1934).

tion is doubtful, to say the least, since the problem of *tracing* a trust fund logically requires assuming the existence of a trust. It is difficult to see how one could *trace* that which did not exist. In the *Sullivan* case, the court seems inadvertently to have overlooked the question of finding a trust *res* and to have assumed that the referee had found that a valid trust existed. The facts of that case disclose little basis for any such finding. It is submitted that the cases are indistinguishable and that the instant case squarely opposes the implicit holding of the *Sullivan* case. At any event, the court in the principal case, in following a recent United States Supreme Court decision,<sup>4</sup> is clearly correct. Debiting the employees' accounts and crediting the account of plaintiff was merely a shifting of credits and no *res* was segregated to which the trust could attach.

P. W. H.

WORKMEN'S COMPENSATION ACT — MISLEADING INFORMATION BY COMMISSIONER AS GROUNDS FOR ESTOPPEL. — A claimant for workmen's compensation was informed by the commissioner that he could accept payments under the award already made and, if proper showing be made, have his case reopened upon later application and be eligible for additional compensation. The commissioner failed or neglected to inform the claimant that acceptance of the payments would constitute a waiver of his right to a hearing on the present award, and would obligate him, on later application, to show a progression or aggravation of his injuries which theretofore had not been considered. *Held*, one judge dissenting, that acceptance of the payments by the claimant should not preclude him from showing that the award was insufficient for his present disability. *Turner v. State Compensation Comm'r.*<sup>1</sup>

The court conveniently states the principle governing its holding: "Time and time again this Court has held that the Commissioner may pursue such a course of conduct that he is estopped to apply strictly the provisions of the workmen's compensation statute." Cases in which this principle has been involved will be considered in order to determine what course of conduct has been held to estop the commissioner. In three similar cases,<sup>2</sup> decided

<sup>4</sup> *McKee v. Paradise*, 299 U. S. 119, 57 S. Ct. 124, 81 L. Ed. 75 (1936); *Comment* (1936) 43 W. VA. L. Q. 241.

<sup>1</sup> 17 S. E. (2d) 617 (W. Va. 1941).

<sup>2</sup> *Calloway v. Workmen's Compensation Comm'r*, 113 W. Va. 47, 166 S. E. 700 (1932); *Yeager v. State Compensation Comm'r*, 113 W. Va. 257, 167 S. E.